82 - 1768

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether a state chancery court may, under the Due Process Clause and decisions of this Court, be given unbounded "discretion" to order a class action defendant to "turn-over" approximately $8,000,000 of its assets to a court-appointed trustee prior to judgment and without bond, when there has not been a prior showing of either (1) the defendant's actual or probable liability to the plaintiff class for that amount *or* (2) the plaintiff class' probable inability to collect any judgment ultimately rendered, absent such "turn-over" order?

RULE 28.1 STATEMENT

Petitioner, Commonwealth Edison Company, has no parent company. Commonwealth Edison Company does not have any subsidiaries (other than wholey owned subsidiaries) or affiliates within the meaning of Rule 28.1.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Commonwealth Edison Company petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First Judicial District in the decision that petitioner seeks to have reviewed is reported at 109 Ill.App. 3d 498. (Appendix A, 1a-4a) The order of the Illinois Supreme Court denying leave to appeal (Appendix F, 18a) is unreported officially. The Orders and proceedings of the Circuit Court of Cook County, Illinois from which appeal was taken (Appendix C, 8a-12a) and (Appendix D, 16a) are unreported.

JURISDICTION

Petitioner seeks review of the judgment of the Appellate Court of Illinois, First Judicial District, entered September 20, 1982. Petitioner's timely Petition For Leave To Appeal was denied by Supreme Court of Illinois on February 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV, §1.

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

The pertinent provisions of Ill. Rev. Stat., ch. 24, ¶ 8-11-2, Ill. Rev. Stat., ch. 111-⅔, ¶ 36(a) and the Chicago Municipal Code, §§132-17, are set forth at Appendix H, 36a-38a)

STATEMENT OF THE CASE

The City of Chicago ("the City") imposes taxes on sales of electric, gas and telephone service in the City. Chicago Municipal Code, §§132-3 *et seq.* Each of the taxes is measured by the "gross receipts" from sales of the service in question. Petitioner Commonwealth Edison Company ("Edison") is the utility providing electric service in the City and is, as a technical matter, the taxpayer with respect to the tax imposed on sales of electricity.[1] Chicago Municipal Code, §132-17. However, under the Illinois Public Utilities Act a public utility has an absolute

[1] The Peoples Gas Light & Coke Company and Illinois Bell Telephone Company ("Illinois Bell"), respectively, are the technical taxpayers under the taxes imposed upon sales of gas and telephone service.

right to pass these taxes on to its customers. This is done by way of an additional charge, prescribed by statute, equal to the amount of the City's tax, an accounting charge of 3% of the amount of that tax and an amount to cover any other taxes or governmental charges which may be increased because of this pass-on of the City's taxes. Ill. Rev. Stat., ch. 111-⅔, ¶ 36(a). (the "Section 36(a) charge"). Edison retains only the accounting charge; it remits the full amount of the City tax component of the Section 36(a) charge to the City.

In December, 1978, respondent Charles A. Getto (the "Plaintiff"), filed a class action complaint in the Chancery Division of the Circuit Court of Cook County, Illinois against the City and Edison. The complaint challenged the method used to compute the City's tax on electric service and the corresponding Section 36(a) charge. Specifically, Plaintiff asserted that by including the Section 36(a) charge in the "gross receipts" base upon which the tax is imposed, the City had assessed an illegal "tax on a tax" and Edison had, therefore, collected excessive Section 36(a) charges from its customers, the plaintiff class. Plaintiff claimed that the City had thus been unjustly enriched by the excessive utility tax payments and that Edison had been unjustly enriched to the extent that the 3% accounting charge was based upon the excessive portion of the tax. (Complaint, ¶7, C7) The complaint sought, *inter alia,* a declaration that the method by which the tax was calculated was unlawful, and money damages for the excessive tax and related accounting charge payments. The complaint in this case was substantially identical to a complaint Plaintiff filed seventeen months earlier against the City and Illinois Bell (the "Bell Action"), which challenged the method of calculating the City's tax on telephone service and Illinois Bell's corresponding Section 36(a) charge.

Both Edison and the City filed motions to dismiss the Plaintiff's complaint. These motions were denied on October 25, 1979, following a decision by the Illinois Supreme Court in a

direct interlocutory appeal in the Bell Action, which upheld the complaint against Illinois Bell and the City. *Getto* v. *City of Chicago,* 77 Ill.2d 346 (1979). Edison then filed its answer denying Plaintiff's substantive allegations,[2] raising objections to the relief requested and asserting various factual affirmative defenses, including voluntary payment and laches.

On April 7, 1980 the Circuit Court of Cook County certified a plaintiff class consisting of essentially all City customers of Edison since December 12, 1968, ten years prior to the date Plaintiff's complaint was filed. Proceedings in this case were then held in abayence pending resolution of a second interlocutory appeal taken in the Bell Action.

In June of 1981, shortly after the Illinois Supreme Court's decision in the second interlocutory appeal in the Bell Action, Plaintiff presented a motion requesting that the Circuit Court order Edison to "turn-over" to a court-appointed trustee an amount equal to the total of the class claims. *See* Appendix B, 6a-7a. This amounted to approximately $8,000,000, of which less than $250,000 represented "excessive" accounting charges retained by Edison.[3] Plaintiff's sole ground for the motion appears to have been that the Illinois Supreme Court had

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[2] There is at least one potentially significant difference between the tax computation complained of in this case and that stricken by the Illinois Supreme Court in the Bell Action. There the tax was levied at the maximum rate permitted by state law, 5%, and thus the effect of the "tax on tax" was to raise the tax beyond this limitation. Ill. Rev. Stat., ch 24, ¶8-11-2 (1). In this case the tax rate is only 4%, and however construed, the tax has never reached the 5% statutory maximum. Ill. Rev. Stat., ch 24, ¶8-11-2 (3). Edison recognizes that the significance of this distinction is strictly a matter of state law.

[3] These estimates were made by Edison and are based upon certain mathematical assumptions and one of the possible interpretations of the Illinois Supreme Court's decision in *Getto* v. *City of Chicago,* 77 Ill.2d 346 (1979). While as yet there has been no determination of the actual amount of Plaintiff's claims, the Circuit Court appears to be willing to accept Edison's estimate of the amount to be "turned-over."

upheld a similar "turn-over" order in the second interlocutory appeal in the Bell Action. *Getto* v. *City of Chicago,* 86 Ill.2d 39 (1981), *cert. denied,* 102 S.Ct. 2012 (1982).

This motion was made in the absence of any previous evidentiary hearing or determination by the Court regarding (1) the probable liability of Edison to the class for anything save, perhaps, the "excessive" portion of the accounting charge, or (2) whether Edison's factual affirmative defenses would bar recovery by a significant portion of the class. Of equal importance there had been no showing, or even suggestion, that there was any likelihood that Edison would not be able to satisfy any judgment which might be entered. In its Memorandum in Opposition to the Motion, Edison argued, *inter alia,* that entry of the requested order in the absence of any hearing on these issues would be a denial of Edison's constitutional due process rights. *See* Appendix I, 39a.

Nonetheless, the Circuit Court granted the motion without requiring that Plaintiff make any factual showing, or allowing Edison to make any such showing. *See* Appendix C, 10a-12a. The Court entered an order, *Id.* at 8a-9a, directing that Edison "turn-over" to the court-appointed trustee an amount equal to the aggregate amount claimed on behalf of the plaintiff class.[4] This, in substance, amounted to a prejudgment attachment and sequestration of some $8,000,000 of Edison's assets without any factual presentation whatever. Plaintiff was not required to post bond. The Circuit Court stated no reason for its action, see *Id.* at 12a, and one must assume that it was based solely on the fact of the Supreme Court's affirmance of a similar order in the Bell Action. Edison's timely motion to reconsider the "turn-over" order was denied by the Circuit Court without opinion. Appendix D, 13a-16a. Edison appealed the "turn-over" order

[4] How Edison could be expected to "turn-over" some $7,750,000 which had theretofore been remitted to the City was, and remains, a mystery.

to the Appellate Court of Illinois, First Judicial District. There Edison again presented its due process claims under the Fourteenth Amendment. Appellant's Brief of Edison, pp. 24-27; Appendix I, 40a-41a.

The Appellate Court affirmed the "turn-over" Order, holding that it was within the "discretion" of the Circuit Court to enter such an order. *See* 5a. In a decision which did not address the constitutional issues raised by Edison,[5] the Appellate Court held that the matter was controlled by the Illinois Supreme Court's decision in *Getto* v. *City of Chicago,* 86 Ill.2d 39 (1981), *cert. denied,* 102 S.Ct. 2012 (1982). *Id.* at 5a. The Illinois Supreme Court's decision, which the Appellate Court believed controlled the issues raised here, made no reference whatever to any potential constitutional claim. *See* Appendix G, 19a-35a. Although it is true that the circumstances surrounding the entry of a "turn-over" order in that case were similar to those presented here, there is one very important difference between this case and the Bell Action: Illinois Bell failed to raise the constitutional issues at any time prior to its request that the Illinois Supreme Court re-hear the decision reached in that second interlocutory appeal.

Edison sought leave to appeal the decision of the Appellate Court to the Illinois Supreme Court. Edison again argued that the entry of the "turn-over" Order, without a prior showing either of Edison's probable liability for the alleged overcharges or of Plaintiff's probable inability to collect any judgment ultimately rendered against Edison absent an attachment and sequestration of $8,000,000 of its assets, violated Due Process. Edison's Petition For Leave To Appeal, pp. 12-19. The Illinois Supreme Court denied Edison's Petition For Leave To Appeal without opinion. *See* Appendix F, 18a. The question of the constitutionality of the equitable prejudgment attachment and

[5] The Court merely observed that Edison presented the issues. *See* 4a.

sequestration "turn over" Order is, therefore, presented by the decision of the Appellate Court of Illinois, First Judicial District and is reviewable under 28 U.S.C. §1257(3).

REASONS FOR GRANTING THE WRIT

This case presents a question not previously directly addressed by this Court.[6] That is whether a state chancery court may, consistent with the Due Process Clause and decisions of this Court, be given unbounded "discretion" to order a class action defendant to "turn-over" approximately $8,000,000 of its assets to a court-appointed trustee prior to judgment and without bond, when there has been no hearing or other evidentiary presentation whatever to determine either (1) the defendant's actual or probable liability to the plaintiff class for those amounts or (2) the plaintiff class' probable inability to collect any judgment ultimately rendered, absent such "turn-over" order. The decision of the Appellate Court of Illinois, First Judicial District affirming such an Order is in direct conflict with the decisions of this Court, and summary reversal under this Court's Rule 23.1, U.S. Sup. Ct. Rule 23.1, 28 U.S.C., would be an appropriate disposition of this Petition.

In a long line of cases beginning with *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), this Court has consistently held that constitutional due process guarantees apply to state

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[6] Edison recognizes that this Court denied a petition for a writ of certiorari to review the Illinois Supreme Court's affirmance of the similar attachment and sequestration order entered in the Bell Action. 102 S.Ct. 2012. However, as stated above, Illinois Bell did not raise the issue at any time prior to the Illinois Supreme Court's decision in that case. Thus, the issue was not properly preserved for review in this Court. This case does present the issue squarely. At every stage of the litigation, Edison has protested that the "turnover" order deprived it of its right to due process under the Fourteenth Amendment.

action depriving a defendant, through attachment, garnishment or sequestration, of the use of assets during the pendancy of a lawsuit. *See North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). While this Court has recognized the legitimate interest of the plaintiff in assuring, under appropriate circumstances, that the defendant will not dispose of, encumber or remove assets that are needed to satisfy a judgment, the defendant must be provided certain minimum substantive and procedural protections against unnecessary, arbitrary or unwarranted deprivations of its assets.

The decisions of this Court require that before there can be a prejudgment attachment or sequestration, the plaintiff must establish, at an evidentiary hearing, probable need for the remedy requested.[7] *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. at 607. The hearing must provide a real test to prevent unfair and mistaken deprivations of property. First, the plaintiff must establish on a factual basis that the attachment, sequestration or seizure is reasonably necessary to secure payment of any judgment or as a means of preventing removal or dissipation of assets required to satisfy any damages awarded. *Fuentes* v. *Shevin*, 407 U.S. at 93. *See North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. at 611 (Powell, J., concurring).[8]

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[7] This Court has held that there are "extraordinary situations" that justify postponing the opportunity for hearing until after the deprivation of assets has occurred. *See Fuentes* v. *Shevin*, 407 U.S. at 90-01. Such extraordinary situations all involve seizures directly necessary to secure an important governmental or general public interest coupled with a showing of a special need for prompt action. This case is clearly not such a truly unusual situation, and even plaintiff has never so characterized it. The order in this case also does not provide or contemplate the immediate postseizure hearing and dissolution of the "turn-over" Order "unless plaintiff proves the grounds upon which the [Order] was issued," approved in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 618 (1974).

[8] See also Guzman v. *Western State Bank*, 516 F.2d 125, 130-33 & n.6 (8th Cir. 1975); *MPI, Inc.* v. *McCullough*, 463 F.Supp. 887, 895-96 (N.D. Miss. 1978).

Second, the plaintiff must make a showing of the validity, or probable validity, of his claim against the defendant. *Fuentes* v. *Shevin,* 407 U.S. at 97; *Sniadach* v. *Family Finance Corp.,* 395 U.S. at 343 (Harlan, J., concurring).[9] Clearly, without such showings, the defendant can be denied significant property rights pending a final judgment when there is no reason whatever for such deprivation.

The "turn-over" Order affirmed by the Appellate Court of Illinois defies these principles. The Circuit Court of Cook County entered the "turn-over" order even though Plaintiff made no attempt to make the preliminary showings required by due process.[10] There was no proof offered by respondent of the extent of Edison's actual or probable liability, if any, to the class. Significant factual and legal issues remain unresolved — and unheard — before Edison can be held liable to Plaintiff or any member of the class, including whether various members

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[9] *See also Hernandez* v. *Danaher,* 405 F.Supp. 757, 762 (N.D. Ill. 1975) (three-judge court), *aff'd mem. sub nom Quern* v. *Hernandez,* 440 U.S. 951 (1979); *Mississippi Chemical Corp.* v. *Chemical Const. Corp.,* 444 F.Supp. 925, 935-938 (S.D. Miss. 1977); *United States General, Inc.* v. *Arndt,* 417 F.Supp. 1300, 1313 (E.D. Wisc. 1976).

[10] In support of his motion for the "turn-over" Order, respondent offered the following:

> These funds are to be placed in a segregated account for the protection of all persons concerned . . . . The protection that Plaintiffs seek on behalf of the class is that this money be put to work at the currently high rates of interest . . . . [I]f these funds should be held to belong to the ratepayers and should be the basis of a refund, then the class will have the benefit of the Court's protection by reason of the accumulation of interest on this account. I believe that this turnover is to implement the definition of the class. *Appendix C, 10a-11a.*

of the class voluntarily paid the alleged overcharges.[11] Indeed, Edison has been granted a Summary Judgment on its Counterclaim for Indemnification against the City of Chicago. *See* Appendix E, 17a. Thus, the effect of the "turn-over" order is to deprive Edison of approximately $8,000,000 even though the ultimate liability of Edison to the plaintiff class for this amount appears to be nonexistent.

Of greater significance, Plaintiff has never made even the most cursory attempt to show, as required by due process, that he or the class may or will be unable to collect any judgment against Edison absent the issuance of the sequestration order. *See, e.g. Fuentes* v. *Shevin*, 407 U.S. at 93. Patently, no such showing could be made. There is absolutely no evidence in the record, or *dehors* the record, which in any way suggests that Edison is wasting, dissipating, or removing its assets from the jurisdiction of the Illinois courts so as to raise even the slightest risk of nonrecovery from Edison even should a judgment in the full amount of the alleged overcharges be entered against it. There has never been any suggestion that Edison's resources are or might be inadequate to satisfy any such judgment. Thus, the constitutionally permissible rationale for a prejudgment deprivation of Edison's property is simply not — nor could it be — present in this case.

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[11] Edison recognizes that the Illinois Supreme Court held that the voluntary payment doctrine did not bar Plaintiff's claims against Illinois Bell as a matter of law, because the various class members may have been coerced into making the payments or ignorant of the method by which the tax and consequent charges were computed. *Getto* v. *City of Chicago*, 86 Ill.2d 39 (1981), *cert. denied*, 102 S.Ct. 2012 (1982). Edison does not believe that the Illinois Supreme Court in so holding abolished the voluntary payment doctrine. Rather it held only that voluntary payment was an affirmative defense which had to be proved as a matter of fact, as opposed to a defense which barred the claims as a matter of law. Surely, that Court was not holding that all of Illinois Bell's customers, which include, among others, Edison, were so coerced or ignorant, as a matter of law.

The decision of the Appellate Court of Illinois upholds a significant deprivation of Edison's recognized constitutional Due Process rights. The Appellate Court of Illinois affirmed the "turn-over" Order solely on the basis of the decision of the Illinois Supreme Court in the second appeal in the Bell Action. *See* 3a-5a. In that decision, the Illinois Supreme Court upheld a similar "turn-over" Order even though the Court recognized that "no determination whatever" had been made as to liability for alleged overcharges. *See* 31a. The Illinois Supreme Court upheld the sequestration in the Bell Action, and the Appellate Court of Illinois affirmed the "turn-over" Order in this case, solely on the basis that an equitable attachment and sequestration of millions of dollars of a defendant's assests was within the apparently unbounded "discretion" of a state court sitting in equity, irrespective of whether the defendant could or would be held liable to the plaintiff class for the amount in question, or would be unable to pay any judgment rendered against it.[12] The Illinois Supreme Court's ruling in the second appeal in the Bell Action may be explained by the fact that the Illinois Bell did not even raise the due process issue prior to its petition for rehearing in that Court.[13] The Appellate Court of Illinois, First Judicial District had no such excuse in the present case.

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[12] There is no Illinois statute which purports to give a court power, discretionary or otherwise, to enter an attachment and sequestration order under circumstances such as those presented here; and neither the Illinois Supreme nor Appellate Court has offered even a hint as to what the limits of a Circuit Court's discretion may be. The "discretion" referred to by the Illinois Courts is thus truly unbounded.

[13] While Edison filed an *amicus curiae* brief in the second Bell Action appeal which raised some of the constitutional arguments later made by Illinois Bell in its petition for rehearing, the Illinois Supreme Court was under no obligation to determine an issue raised for the first time on appeal and then only by an *amicus*. Any reading cursory review of the decision of the Illinois Supreme Court in the second Bell Action appeal (Appendix G) reveals that that Court did not address the constitutional issues presented by Edison's *amicus curiae* brief.

While this Court's decisions defining prejudgment seizures have generally involved consideration of state statutory remedies, there is no reason for any distinction between actions at law and equity under the Due Process Clause. In *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945), this Court rejected as beyond the power of a federal court sitting in equity the issuance of a prejedgment sequestration injunction analagous to the "turn-over" order here. As this Court stated in language equally applicable to the present "turn-over" order:

> To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

325 U.S. at 222-223. *See ITT Community Development Corp.* v. *Burton,* 569 F.2d 1351 (5th Cir. 1978).

This case squarely presents to this Court the similar question of the constitutionally permissible limits of the exercise of "discretion" by state courts sitting in equity in ordering prejudgment seizures of a defendant's assets. The unfettered exercise of equitable "discretion," such as that upheld by the Appellate Court of Illinois in this case, if unchecked by this Court, could lead to significant alteration of our adversary legal

system in the state chancery courts. As this Court observed in *DeBeers Consolidated Mines, Ltd., Id.*, any plaintiff in equity could then seize from a defendant, well before judgment, the full estimated amount of potential damages claimed by plaintiff without a prior showing of even probable liability or a present need to safeguard the defendant's assets from dissipation. Such a result, and the equitable "discretion" which leads to it, are in stark conflict with the many decisions of this Court interpreting the Due Process Clause in the area of prejudgment property deprivations.[14] For this reason, this case is an appropriate one for summary reversal. In any event, this petition should be granted and, if not summarily reversed, the cause should be set down for oral argument.

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[14] *Cf In Re Gault*, 387 U.S. 1 (1967), where this Court rejected as violative of Due Process an Arizona Juvenile Code that allowed for proceedings in which the Juvenile Court exercised almost unlimited discretion in deciding whether to remove a juvenile from the custody of his parents.

CONCLUSION

For the foregoing reasons, Edison respectfully submits that the petition for writ of certiorari should be granted and the decision of the Appellate Court of Illinois, First Judicial District summarily reversed, or, if not summarily reversed, this cause should be set down for oral argument.

Respectfully submitted,

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April 29, 1983

APPENDICES

APPENDIX A

First Division
Filed September 20, 1982

81-1792

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,
Plaintiff-Appellee,

vs.

CITY OF CHICAGO, a municipal corporation, et al.,
Defendants,

and

COMMONWEALTH EDISON COMPANY, a corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County

—

Honorable
George J. Schaller,
Judge Presiding.

PRESIDING JUSTICE CAMPBELL delivered the opinion of the court:

Defendant, Commonwealth Edison, brings this interlocutory appeal from an order of the circuit court of Cook County which required defendant to remit to a court-appointed trustee *pendente lite* the estimated amount of alleged municipal utility tax overcharges which plaintiff and class members claim were unlawfully assessed and collected by defendant. On appeal, defendant raises the following issues: (1) whether the court's order requiring defendant to "turn-over" to a trustee the estimated amount of alleged municipal utility tax overcharges is permissible under Illinois law; and (2) whether the court's "turn-over" order deprived defendant of its property without due process of law.

This action is a class action which plaintiff, Charles A. Getto, has brought against the City of Chicago and Commonwealth Edison which provides electricity to residents of the City. In addition to this action, plaintiff also brought a similar suit against the City and Illinois Bell Telephone Company. The action involving Illinois Bell has been before the Illinois Supreme Court twice on interlocutory appeals. (*Getto v. City of Chicago* (1979), 77 Ill. 2d 346, 396 N.E.2d 544 (*Getto I*); *Getto v. City of Chicago* (1981), 86 Ill. 2d 39, 426 N.E.2d 844, *cert. denied* ____ U.S. ____, 72 L.Ed. 2d 468, 102 S.Ct. 2012 (*Getto II*).) This court dismissed an interlocutory appeal brought by non-Cook County municipalities and public utilities which were named as defendants in amendments to the complaint involved in the instant action, but which are not parties to the present appeal. *Getto v. City of Chicago* (1981), 92 Ill. App. 3d 1045, 416 N.E.2d 1110.

In December, 1978, plaintiff "individually and on behalf of all persons similarly situated" filed this action against the City of Chicago and Commonwealth Edison ("Edison") in which plaintiff challenged the method utilized by defendants in calculating the City's municipal utility tax (MUT). Pursuant to section 8-11-2 (3) of the Illinois Municipal Code, a municipality may tax "persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom." (Ill. Rev. Stat. 1975, ch. 24, par. 8-11-2(3).) Pursuant to this statute, the City imposed a 4% tax upon the gross receipts of Edison. (City of Chicago Municipal Code, section 132-16 et seq.) Section 36(a) of the Public Utilities Act authorized Edison to charge its customers "an amount equal to such municipal tax * * * [and] 3% of such tax * * * to cover costs of accounting." (Ill. Rev. Stat. 1975, ch. 111-2/3, par. 36(a).) Plaintiff alleged that the City and Edison included in their determination of Edison's gross receipts an amount which included the municipal tax itself and the 3% accounting charges

authorized by section 36(a). The complaint alleged that the method used to determine the amount of the tax resulted in the imposition of an unlawful tax upon a tax. Plaintiff, for himself and the class members, sought, *inter alia,* a declaration that the portion of the MUT collected in excess of the gross receipts base be declared unlawful, an injunction prohibiting the collection of excess MUT and accounting charges by Edison, and a refund to Edison customers of the excess MUT accounting charges which were improperly assessed.

In March, 1979, plaintiff requested the creation of a special protest fund into which Edison was to pay the MUT which it collected in excess of its gross receipts, together with the accounting charges attributable to the excess tax. In October, 1979, the court ordered the creation of a special protest fund into which Edison was directed to pay all excessive taxes and charges which it collected from its customers. Edison made payments to this fund, which payments apparently consisted of amounts which Edison collected from its customers in the billing periods subsequent to the date of the court's order. In June, 1981, the court granted plaintiff's motion for a "turn-over" order. This "turn-over" order directed Edison to pay into the special protest fund all monies collected by Edison from its City customers since December 12, 1968, as overcharges for the City's MUT and for Edison's accounting charge. According to Edison, this amount is approximately $8,000,000. It is from this "turn-over" order that Edison brings this interlocutory appeal pursuant to Supreme Court Rule 307 (a). Ill. Rev. Stat. 1979, ch. 110A, par. 307(a).

At the outset, we note that the Illinois Supreme Court in *Getto II* upheld a similar "turn-over" order entered against Illinois Bell. In discussing the "turn-over" order, the supreme court stated:

> "Bell also argues that the circuit court erred in ordering Bell to turn over to the trustee all overcharges collected by it since July 18, 1967, which have not already been deposited by the city of Chicago in the special protest fund

> created by order of the circuit court. Bell argues that, since it has already remitted those tax monies to the city, this court should order that the city and not Bell is responsible for all excess payments, including those made beginning in July 1967. That obviously would be improper. No determination whatever has been made as to liability for overcharges. Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee, excepting those excess charges already deposited with the trustee by the city pursuant to the court's order. This order did not represent any determination of liability by the circuit court." 86 Ill. 2d 39, 55, 426 N.E.2d 844, 852, *cert. denied* ____ U.S. ____, 72 L.Ed. 2d 468, 102 S.Ct. 2012.

Edison argues that the instant case is distinguishable from the Illinois Bell action because of numerous factual issues which are unique to this cause and, therefore, *Getto II* is not dispositive of the present appeal. Edison urges that the trial court's order cannot stand as a final judgment on the merits, that the order cannot be upheld as a valid pre-judgment attachment of Edison's property and that the order cannot be upheld as a valid exercise of the court's equitable jurisdiction. Edison maintains that the supreme court in *Getto II* did not consider the trial court's authority to enter the "turn-over" order, nor did it consider whether the order was permissible under the due process clause. Edison also contends that Illinois Bell, more or less, acquiesced to the entry of a "turn-over" order against it.

Edison has advanced numerous arguments in its attempt to vacate the "turn-over" order. In addition, both parties have called our attention to the fact that Edison filed an *amicus curiae* brief in *Getto II* where it appears that similar arguments to those raised here were considered. We have considered the arguments raised by Edison in this case and do not feel that a detailed discussion would alter the outcome of this case in light of the language employed by the Illinois Supreme Court in *Getto II*. We are not persuaded by Edison's attempts to distinguish the decision in *Getto II* and view *Getto II* to be controlling. We hold that the trial court did not abuse its discretion in entering the "turn-over" order against Edison.

Accordingly, the order of the circuit court of Cook County is affirmed and this cause is remanded for further proceedings.

Order affirmed; cause remanded.

McGLOON and GOLDBERG, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,

Plaintiff,

-vs-

CITY OF CHICAGO, a municipal corporation, COMMONWEALTH EDISON COMPANY, a corporation, et al.,

Defendants.

No. 78 CH 8042

MOTION

Now comes plaintiff CHARLES A. GETTO, by his attorneys and pursuant to order of Court heretofore entered on April 7, 1980, respectfully moves the Court as follows:

1. For an order directing defendant COMMONWEALTH EDISON COMPANY to turn over forthwith, to Mr. Earl A. Deutsch, the Trustee herein, all monies heretofore collected by COMMONWEALTH EDISON COMPANY from its customers located or residing in the City of Chicago since December 12, 1968, as overcharges for the City of Chicago's electric utility taxes in excess of the 4% rate authorized by law, and who have been overcharged for such excess by COMMONWEALTH EDISON, the Trustee to hold and administer said funds for the benefit of the class heretofore defined and certified by the Court on April 7, 1980, and until the further order of the Court.

2. For an order appointing a reputable accounting firm of certified public accountants, with particular expertise in public utility accounting, to conduct an audit of all utility tax returns heretofore filed by COMMONWEALTH EDISON COMPANY with the City of Chicago from the period defined in the class certification to the present.

3. For an order approving the proposed plan of publication of notice to the class as defined and certified in the Court's order of April 7, 1980, copy of which proposed notice is herewith.

Attorneys for Plaintiff
SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

LEONARD E. HANDMACHER
134 North LaSalle Street
Chicago, Illinois 60602
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APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiff,* *v.* CITY OF CHICAGO and COMMONWEALTH EDISON COMPANY, et al., *Defendants.*	No. 78 CH 8042

ORDER

This cause coming on to be heard on the June 15, 1981 motions of plaintiff (1) For a Turnover order directed to defendant COMMONWEALTH EDISON (2) For the appointment of a firm of Certified Public Accountants to conduct an audit of COMMONWEALTH EDISON returns of the City, utility tax for the period defined in the class and (3) to approve a plan and proposed Notice to the Class, and COMMONWEALTH EDISON having filed its response containing objections thereto and the Court being advised in the premises.

It is *ORDERED:*

(1) The motion for a Turnover is hereby granted and defendant COMMONWEALTH EDISON is directed forthwith to comply with the turnover requested in the motion.

(2) The trustee is directed to obtain estimates or proposals of the costs of conducting an appropriate audit and to submit his recommendations as to appointment of a qualified CPA firm to conduct such audit and the evaluations of such audit.

(3) Plaintiff and defendant are directed to compose a suitable Notice to the Class to include certain Edison objections.

(4) This cause is continued for report of status to July 2, 1981 at 10:30 a.m.

June 22, 1981

ENTER:

/s/ GEORGE J. SCHALLER

Judge

SIDNEY Z. KARASIK
LEONARD E. HANDMACHER
134 South LaSalle Street
Chicago, Illinois 60603
782-7295

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO, et al.,

Plaintiffs,

vs.

CITY OF CHICAGO, COMMONWEALTH EDISON, et al.,

Defendants.

No. 78 CH 8042

REPORT OF PROCEEDINGS had at the hearing in the above entitled cause before the Honorable George J. Schaller, this 22nd day of June, 1981.

* * * *

THE COURT: There are three motions, and Mr. Karasik start at the top.

MR. KARASIK: Your Honor, I think our motion for the turnover order speaks for itself. We call the court's attention to the fact that back in April of 1980 the court defined and certified the class. The case was put on hold pending appeal in the parallel case of the City of Chicago and Illinois Bell in which an almost identical definition was proposed and was approved by the Supreme Court. We believe that at this point, the definition of the class which your Honor made in the Commonwealth Edison case involving the Chicago class of customers should be implemented by this turnover order.

In a sense, this is not contrary to Commonwealth Edison's contention, the taking away of their property. These funds are to be placed in a segregated account for the protection of all persons concerned. The turnover order does not constitute any final judgment. I think the Supreme Court was clear in that. The protection that the plaintiffs seek on behalf of the class is that this money be put to work at the currently high rates of

interest. And that would be unconscienable to permit Edison to retain these funds for its own account. If at some future date it should be determined by the court that Edison is not liable and it is not going to be hurt, its funds could be returned to it. The interest that is collected would inure to its benefit. On the other hand, if these funds should be held to belong to the rate payers and should be the basis of a refund, then the class will have the benefit of the court's protection by reason of the accumulation of interest on this account. I believe that this turnover is to implement the definition of the class.

* * * *

THE COURT: Mr. Schroeder.

MR. SCHROEDER: On behalf of Commonwealth Edison, we filed with the court last Thursday our written objections. This turn-over order can be characterized as we point out, as a prejudgment attachment. And if it is not characterized as a prejudgment attachment, it can be characterized as a final judgment on a motion for judgment on the pleadings or summary judgment despite Mr. Karasik's protestation. I would like to point out to your Honor that we are talking about $7.5 million more or less. We find absolutely no authority in this state to permit $7.5 million to be assessed against the defendant, money which we no longer have, which has been passed on to the city long ago to put that money into a trustee account.

Your Honor, we are going to have to borrow that money at 20 percent interest rates more or less. That being the prime interest rate for it to earn around 12 to 15 percent. It's a terrible loss to the rate payers of Commonwealth Edison Company. If the money is returned, eventually it would not make Commonwealth Edison whole. The potential liability is in the neighborhood of $7.5 million, that's not to say a full $7.5 million, because there may be many people not filing claims for whatever purposes. So the ultimate liability of Edison or the city could be well below $7.5 million if the refund is sustained or directed by this court.

Simply stated, your Honor, we see no reason and indeed no authority of law, despite the ruling in Getto II, for you to enter an order forcing Commonwealth "to turnover", $7.5 million to the trustee.

* * * *

THE COURT: Anything else? Petition is granted. Mr. Karasik, you will present an appropriate order ordering a turnover forthwith. Let's go to the second point of a certified public accountant. Mr. Karasik.

* * * *

EXHIBIT D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO, Individually and on behalf of all persons similarly situated, *Plaintiff,* *v.* CITY OF CHICAGO, a municipal corporation; COMMONWEALTH EDISON COMPANY, a corporation, et al., *Defendants.*	No. 78 CH 8042

MOTION OF COMMONWEALTH EDISON COMPANY TO RECONSIDER AND VACATE OR, IN THE ALTERNATIVE, TO STAY THIS COURT'S JUNE 22, 1981 TURN-OVER ORDER

Commonwealth Edison Company ("Edison"), by its attorneys, moves this Court to reconsider and vacate this Court's June 22, 1981 turn-over order.

In its Response filed on June 18, 1981, Edison suggested to this Court why plaintiff's request for a so-called turn-over order, to be entered without affording this defendant any hearing, was wholly without legal precedent. Since the entry of the turn-over order on June 22, 1981, and in an attempt to determine how to comply with this order, Edison has encountered still more reasons why this Court should conduct a hearing before granting plaintiff's request for such extraordinary relief.

First and foremost without a hearing to determine certain mixed questions of law and fact, Edison is uncertain as to how to calculate the "overcharges" which are the subject of this Court's turn-over order. Among the ambiguities facing Edison are:

(a) What formula to use in order to calculate the "correct" municipal tax addition? Edison understands that at least three different formulas are now being used by this State's various utilities.

(b) How to treat billings to the federal government and the I.C.G. Railroad, both of which are treated differently with respect to the state public utilities tax?

(c) How to treat billings rendered prior to January 1, 1974, before which time Edison's municipal tax addition in the City of Chicago was based on historical usage rather than any "improper" formula?

(d) What assumptions to make with respect to Edison's Section 36(b) charge since it was changed in December, 1979?

(e) How to treat the December 12, 1968, starting date, for Edison pays its City municipal utility tax based on billings rather than "monies . . . collected"?

(f) How to treat the effect of the lag time between the date the tax is billed and when it is due to the City?

Without a determination of these and other questions, Edison cannot possibly calculate the amount of the "overcharges" as contemplated by this Court's order. Edison therefore respectfully requests that this Court vacate its June 22, 1981 turn-over order and that this Court set a date for a hearing at which time plaintiff can present its theory as to how these "overcharges" should be calculated, and Edison can present its evidence.

Edison further requests a hearing in order to present evidence as to the serious prejudice which will inure to it and its rate payers as a result of this turn-over order. Edison understands this Court to have considered the entry of this turn-over order to be a matter within its discretion, but Edison respectfully suggests that without affording Edison a hearing, there is no record upon which this Court can exercise its discretion. Nor is there any basis in the record for assuming that the total of all individual claims eventually provable against Edison will equal the entire amount of all "overcharges".

Edison further states that it has now requested leave to file a counterclaim against the City of Chicago and until the respective liabilities of Edison and the City are determined, any turn-over order against Edison is premature.

For all of these reasons, and the reasons set forth in its Response filed on June 18, 1981, Edison requests this Court to reconsider and vacate its June 22, 1981 turn-over order.

In the alternative, Edison moves this Court, pursuant to Supreme Court Rule 305, to stay, without bond and pending an interlocutory appeal as of right, that portion of the Court's June 22, 1981 order requiring Edison to turn-over "forthwith" certain monies to Mr. Earl Deutsch, Trustee of the Special Protest Fund.

COMMONWEALTH EDISON COMPANY

By: _____

One of its Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO,

v.

COMMONWEALTH EDISON CO., et al.,

No. 78 CH 4802

ORDER

This cause coming on to be heard on Commonwealth Edison Company's motion to reconsider and vacate or, in the alternative, to stay this Court's June 22, 1981 turn-over order upon due notice and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That said motion to reconsider—vacate is denied.

2. The said motion for a stay of the Court's order of June 22, 1981 is denied.

3. Further report of status is set for August 6, 1981 at 10:30 a.m. and to all pending motions.

July 2, 1981

ENTER:

/s/ GEORGE J. SCHALLER

Judge

SIDNEY Z. KARASIK
LEONARD E. HANDMACHER
134 North LaSalle Street
332-4222

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department—Chancery Division

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiff,* *v.* CITY OF CHICAGO, a municipal corporation, COMMONWEALTH EDISON COMPANY, a corporation, et. al. *Defendants.*	No. 78 CH 8042

ORDER

Upon the Motion of COMMONWEALTH EDISON COMPANY ("EDISON") for summary judgment on its counterclaim against the City of Chicago ("City"), due notice having been given, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that, for the reasons set forth by this Court in its oral remarks on September 9, 1980, in the action captioned *GETTO v. CITY OF CHICAGO AND PEOPLES GAS LIGHT AND COKE COMPANY* (78 CH 8043) and as set forth by this Court in its oral remarks on September 2 and September 10, 1982, in the instant action, Edison's motion is hereby granted and a conditional judgment is hereby entered in favor or EDISON and against the CITY.

Nunc pro tunc
as of September 10, 1982.

December 3, 1982

ENTER:

/s/ GEORGE J. SCHALLER

Judge

APPENDIX F

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 1, 1983

Isham, Lincoln & Beale
Attorneys At Law
Three First National Plaza
Chicago, Illinois 60602

No. 57464— Charles A. Getto, indv., etc., respondent, v. City of Chicago, a municipal corporation, et al. (Commonwealth Edison Company, a corporation, petitioner).

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

APPENDIX G

No. 53203

IN THE
SUPREME COURT OF ILLINOIS

CHARLES A. GETTO, Appellee,

v.

THE CITY OF CHICAGO *et al*,

Opinion Filed June 4, 1981
Rehearing Denied October 19, 1981

MR. JUSTICE WARD delivered the opinion of the court:

This case presents the second interlocutory appeal filed by the Illinois Bell Telephone Company (Bell) and the city of Chicago arising out of a class action suit brought against both parties in July of 1977 by Charles A. Getto. In this suit, filed on behalf of Getto and all persons similarly situated, the plaintiff challenged the method employed by the defendants in calculating the city's municipal message tax. This ordinance imposed a tax "upon all persons engaged in the business of transmitting messages by means of electricity at the rate of five per cent of the gross receipts from such business" originating within the corporate boundaries of the city of Chicago. In calculating the message tax, the defendants interpreted the term "gross receipts," upon which the tax was based, to include the total amount of income received through customer billing and other customer sources as well as the 5% message tax on these receipts.

This manner of taxation, it was argued, resulted in an illegal "tax on a tax." The burden of the tax was then passed on to Bell's customers pursuant to section 36(a) of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111⅔, par. 36(a)), which permits utilities subject to a municipal message tax to collect, as

an additional charge from their customers, an amount equal to the tax paid or any part of the tax. This section also allows the utility to impose an additional service charge of 3% of the message tax on each subscriber to cover costs of accounting.

On December 19, 1978, the circuit court of Cook County held that the plaintiff, "for himself and on behalf of all other persons similarly situated," had standing to challenge the validity of the city's message tax; that the court and not the Illinois Commerce Commission had jurisdiction over the parties and subject matter of the case; and that the defendants' interpretation of "gross receipts" resulted in an "additional charge to Bell's customers [which was] unauthorized, illegal, irrational, unreasonably burdensome and oppressive to the plaintiff and the class he represents." Based on this the court allowed the plaintiff to maintain a class action. The court also entered a preliminary injunction ordering Bell to "set aside and segregate" that portion of the message tax receipts which exceeded the authorized 5% rate, as well as that portion of the accounting charge which had been erroneously imposed. As part of its order the court directed that any amount which should erroneously be collected contrary to the injunction should be deposited in a special protest fund to be administered and maintained by the court.

The defendants then filed their first interlocutory appeal in the appellate court under Rule 307(a) (73 Ill. 2d R. 307(a)), and this court granted direct appeal here under Rule 302(b) (73 Ill. 2d R. 302(b)). In *Getto v. City of Chicago* (1979), 77 Ill. 2d 346 (*Getto I*), this court held that since the actual burden of the message tax was borne by Bell's customers, the plaintiff class had standing to bring suit; that considering the limits on the Illinois Commerce Commission's statutory authority to provide an adequate remedy, the plaintiff was not required to exhaust his administrative remedies; that the circuit court and

not the Commission had jurisdiction over the dispute; and finally that the defendants' construing the term "gross receipts" to include the municipal message tax was "erroneous." The portion of the order of the circuit court appealed from was affirmed, and the cause was remanded for further proceedings.

Upon remandment to the circuit court, the plaintiff moved for and was given leave to join 105 additional municipalities and four other telephone companies as parties defendant. The plaintiff also filed six motions with the court requesting that the preliminary injunction issued on December 19, 1978, be made permanent; that the court appoint a trustee to take custody and control of the special protest fund; that a new definition of the class members in the suit, tendered by the plaintiff, be certified by the court; that the city of Chicago and Bell comply with all pending discovery requests; that the court appoint an accounting firm to conduct an audit of all message tax returns filed by Bell with the city since December 1, 1955, which was when the message tax ordinance was enacted; and that the court grant whatever further relief might be appropriate.

Both Bell and the city filed objections to these motions. The plaintiff later withdrew his motion seeking a redefinition and certification of the class and instead maintained that the class as certified by the court in its December 19 order was adequate. Bell filed an objection to this certification of the class.

On February 13, 1980, the circuit court ordered that the defendants be permanently enjoined from collecting that portion of the message tax in excess of the authorized rate; that the class be in effect recertified, thereby overruling Bell's objection; and that all parties comply with pending discovery orders. The court also appointed a trustee and an attorney for the trustee in order to administer the special protest fund. Bell was ordered to turn over to the trustee all overcharges collected under the city's message tax after July 18, 1967, that had not been previously deposited by the city with the trustee, including

Bell's excess collection charges for accounting costs. This order adhered to the definition of the plaintiff class, which included all customers of Bell residing in Chicago and making utility payments since July 18, 1967. The court reserved ruling with respect to the appointment of an accounting firm for the purpose of conducting an audit and also with respect to the certification of subclasses involving the 105 municipalities and four other telephone companies joined as parties defendant. Upon denial of Bell's motion to modify this order, both Bell and the city filed notices of interlocutory appeal (73 Ill. 2d R. 307(a)). Subsequent to these filings the plaintiff and both defendants filed motions for direct appeal to this court which we granted. (73 Ill. 2d R. 302(b)). Briefs *amici curiae* have been filed in behalf of several utilities and municipalities.

The defendants first argue that the court's order allowing what they claim is "retroactive" relief from July 18, 1967, should be reversed. This argument is premised upon the size of the class as defined and certified by the court in its December 19 order and later in its order of February 13. The plaintiff class in these orders was defined as "[a]ll customers of Illinois Bell Telephone Company located or residing, in the City of Chicago, who during the period of ten years next before filing of the complaint herein on July 18, 1977, have paid to Bell a charge for the City's message tax in excess of the 5% rate authorized by law and who have accordingly been overcharged in the collection charge made by Bell during said period."

The defendants argue that between December of 1955 and July of 1977, when Getto filed suit, all utility payments to Bell were made without protest and that thereby any recovery is barred under what is described as the voluntary-payment doctrine. As a result, it is contended that any recovery should be limited to the excess taxes paid by the plaintiff after the class action was filed in 1977.

The plaintiff, in response to this, first asserts that the issue of class certification was decided in *Getto I* and therefore is *res judicata.* In the alternative, he contends that the voluntary-payment doctrine does not apply since he did not have knowledge of all the necessary facts to support a finding that these prior payments were voluntary. Further he says that such payments were made under compulsion because of the threat of termination of his phone service, which, he argues, would also prevent application of the voluntary-tax payment doctrine.

We first consider the plaintiff's claim that the question pertaining to the period for the recovery of refunds, that is, the period between July 18, 1967, and July 18, 1977, is *res judicata.* A review of the arguments made in *Getto I* and the opinion show that while the maintenance of the suit as a class action was contested in the trial court, that issue was neither raised nor decided on the appeal. Contrary to the plaintiff's position, that part of *Getto I* which held that the class had standing to file suit did not also affirm the trial court's certification of the class. The interlocutory appeal filed by the defendants challenged only the issuance of the preliminary injunction, and involved the questions of standing and the trial court's authority to exercise jurisdiction in the dispute. In discussing these issues as well as whether the defendants had correctly defined the term "gross receipts," this court did not have to consider the question of whether the class was properly defined and certified.

We are not convinced by the plaintiff's argument that this issue should have been raised on appeal in *Getto I* and that by their failure to do so the defendants are barred from raising the question of retroactive claims for refunds in this appeal. The preliminary injunction issued by the court granted prospective relief only and did not require, as did the permanent injunction issued after *Getto I,* that excess payments since July 18, 1967, be deposited by Bell in the protest fund. Since the preliminary injunction only prohibited, prospectively, excessive collections by the defendants and did not involve the right to file the retroactive claims as described, the defendants were, of course, not obligated to raise that question in their first interlocutory appeal under Rule 307(a).

Too, the defendants were not entitled to challenge the circuit court's certification of the class when they filed their interlocutory appeal in *Getto I*. Our procedural rules affecting class action suits and interlocutory appeals are patterned on comparable Federal rules. Section 57.3 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 57.3), which closely follows Rule 23(c)(1) of the Federal Rules of Civil Procedure, provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be maintained and describe those whom the court finds to be members of the class. ***" This section also states, however, that "[t]his order may be conditional and may be amended before a decision on the merits." Federal courts, in interpreting procedural rules for class action and interlocutory appeals, have held that a party is not entitled to take an interlocutory appeal from a trial court order defining and certifying the class or from a determination as to whether the suit may or may not proceed as a class action since either order is always subject to amendment or modification before a final judgment is entered. See *Gardner v. Westinghouse Broadcasting Co.* (1978), 437 U.S. 478, 57 L. Ed. 2d 364, 98 S. Ct. 2451, and cases cited therein. See also *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 590.

Similarly, there are decisions by Federal courts that since an order granting or refusing a plaintiff's request to proceed as a class action does not terminate the litigation and has no impact upon the merits of the case, it may not be appealed as a final judgment. See *Coopers & Lybrand v. Livesay* (1978), 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454, and cases cited therein.

As of this stage of the action here, no final order or determination of liability has been made. The proceeding is at the discovery stage. As further evidence is presented, the court, in its discretion, may decide to amend or revise its determination of the class. Given the present posture of the case, the defendants would not have been entitled to challenge the trial

court's definition and certification of the class in their interlocutory appeal under Rule 307(a) in *Getto I* and therefore the determination of the issue in this appeal is not barred under the doctrine of *res judicata*.

We turn now to the defendants' claim that payment of retroactive claims would be barred by the voluntary-tax-payment doctrine. This court has held that in the absence of a statute which allows recovery for the payment of those taxes or charges which have been improperly assessed by a municipality or utility, a taxpayer or customer may not recover taxes or fees which have been paid voluntarily. (*Ross v. City of Geneva* (1978), 71 Ill. 2d 27; *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336; *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52; *Illinois Glass Co.* v. *Chicago Telephone Co.* (1908), 234 Ill. 535.) Thus, a party may not recover taxes or charges voluntarily paid unless recovery is authorized by statute. In *Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535, 541, the voluntary-payment doctrine was rather fully stated:

> "It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion."

As has been stated, the defendants argue that since the plaintiff paid his utility bill without any protest until suit was filed in July of 1977, he may not recover funds for any overcharges paid prior to that time. Though payment under protest is the typical means by which a taxpayer signifies his contention that a tax or charge was improper, the absence of such a protest does not, without more, require application of the voluntary-payment doctrine. It must also be shown that the

taxpayer plaintiff had knowledge of the facts upon which to frame a protest and also that the payments were not made under duress or compulsion.

The defendants, citing *Illinois Glass*, contend that the plaintiff is charged with knowledge of the message tax ordinance as well as those statutory provisions which allow a utility to pass along this tax to its subscribers by way of an increased charge for service. Bell further points out that this charge appeared separately on each utility bill to subscribers as required under the statute (Ill. Rev. Stat. 1977, ch. 111⅔, par. 36(a)) and thus no attempt was made to impose the fee upon unknowing subscribers.

Getto's phone bills, which were attached to his complaint, show three separate charges near the bottom of the bill for "U.S. Tax," "State," and "City." The State and city charges are each followed by an asterisk, which, in the lefthand margin of the bill, is explained as "Additional charges due to State and City Taxes." We do not view this purported disclosure of "facts" to be sufficient to warrant application of the voluntary-payment doctrine as the defendants argue, so as to preclude recovery for the earlier years in question.

Though the charge designated "City" does appear separately on the subscriber's bill, it is not stated which municipal tax is involved, or what portion of the bill is being taxed or that the charge includes a 3% charge on the message tax for costs of accounting. Too, with the information provided by his bill, the subscriber has no way of ascertaining that the message tax, which is passed on to him by Bell, was calculated by Bell by applying the 5% tax to the utility's gross receipts, which not only included customer billings, but other customer receipts and the message tax itself. This method of calculation was struck down as "erroneous" in *Getto I*.

The decision in *Illinois Glass* upon which the defendants importantly rely, rested on clearly distinguishable circumstances. There the Chicago Telephone Company was permitted

by an ordinance adopted in 1889 to operate telephone lines for a period of 20 years within the corporate boundaries of the city of Chicago. The agreement was conditioned upon the company's agreeing not to increase the rates beyond those set out in a rate schedule filed with the city. The rate established for a business phone was $125 per year. The plaintiff entered into a contract with the company for business phone service at the prescribed rate. After several years of acceptable service, technical and mechanical difficulties arose "which made it difficult to carry on a conversation." (*Illinois Glass Co.* v. *Chicago Telephone Co.* (1908), 234 Ill. 535, 539.) The phone company investigated the difficulty and proposed that it could and would provide improved service but at an additional charge of $50 a year. That would increase the rate to $175 per year. Illinois Glass, after negotiations, finally agreed to the higher rate and continued to pay it for the next five years. It then brought suit to recover the excess fees paid to the phone company. The court, observing that the contract for phone service was entered into by the plaintiff "deliberately, after negotiations and with full knowledge of all the facts and conditions ***" (234 Ill. 435, 540), held that the voluntary-payment doctrine was applicable.

Here, the utility rates and charges were established by the Illinois Commerce Commission and the city of Chicago, and not through negotiations between Bell and its subscribers. We do not consider that subscribers were here provided with sufficient information or "facts" to determine whether the method of taxation was proper.

Even were it to be held that the plaintiff had sufficient knowledge of all the facts to permit a conclusion that all payments prior to 1977 were voluntary, we judge that the implicit and real threat that phone service would be shut off for nonpayment of charges amounted to compulsion that would forbid application of the voluntary-payment doctrine. This question was addressed in *Ross v. City of Geneva* (1978), 71 Ill. 2d 27. There, the city of Geneva, which operated a publicly

owned utility, levied a 10% surcharge on each subscriber's electrical bill to fund the acquiring and maintaining of parking facilities. Though the ordinance authorizing the addition of the surcharge was enacted in 1962, the charge did not appear separately on utility bills until June of 1973 and then only as a miscellaneous charge. The plaintiff filed a suit in July of that year claiming that the surcharge was illegal. The record showed that the city had a policy of terminating the electrical service of subscribers who failed to pay their bills and that there was no administrative provision for payment under protest. In the course of holding that the city was without authority to levy the surcharge, the court reviewed previous decisions which recognized that payments made under protest to avoid "disastrous effects to business" that would result from the termination of an important service or the revocation of a license to conduct business were involuntary. This court held that "[c]onfronted with the choice of payment of the surcharge or termination of service, plaintiff, in making the payment, acted with prudence and is not barred [by the voluntary-payment doctrine] from recovery of the sums paid." (71 Ill. 2d 27, 33-34.) It was held that the plaintiff could bring a class action to recover all sums paid over the 13-year period involved.

The factor of compulsion and its place in the voluntary-payment doctrine were discussed in *Illinois Glass*. It was observed by the court in 1908:

> "The ancient doctrine of duress of person, and later of goods, has been relaxed, and extended so as to admit of compulsion of business and circumstances, and perhaps a telephone corporation having a system in general operation and connected with customers and other business houses might reasonably influence a business house to make an unwilling payment of an amount illegally demanded, which would make the payment compulsory. The telephone has become an instrument of such necessity in business houses that a denial of its advantages would amount to a destruction of the business." 234 Ill. 535, 541.

The defendants reply by arguing that under General Order 197, section 301(2) of the Illinois Commerce Commission, a privately owned public utility may not interrupt or terminate a subscriber's phone service when the customer has a legitimate dispute as to charges for service. Under this rule, in order to avoid a termination of service, it is said by Bell that the complainant need only pay the undisputed portion of the bill, and future bills, and seek to resolve his dispute with the utility. If the parties cannot resolve the dispute, the customer can then file a complaint with the Commission. Relying upon this general order, the defendants argue that the plaintiff's phone service could not have been terminated and therefore the earlier utility service payments cannot be called involuntary. We do not consider the contention to be valid. That portion of the message tax in excess of the 5% authorized rate which was challenged in *Getto I* was sanctioned and approved by the Commission itself. This was one ground for this court's holding that it was not necessary for the plaintiff to exhaust his administrative remedies. Any attempt by the plaintiff to follow the procedural requirements in General Order 197 would obviously have been pointless and he would have been exposed to possible termination of service. We judge that the plaintiff is not barred under the voluntary-payment doctrine.

Bell raises an additional argument—that the plaintiff's action is barred under the doctrine of *laches*. As we consider that the plaintiff did not have knowledge of all the facts necessary to make a payment that was voluntary, *laches* is not applicable. See *Ross v. City of Geneva* (1978), 71 Ill. 2d 27, 34, and cases cited therein.

The defendants next argue that the supervision of refunds for excess utility rates or charges comes within the exclusive jurisdiction of the Illinois Commerce Commission. As a result, they contend the trial court's appointment of a special trustee to supervise and administer the protest fund was erroneous and should be set aside. A resembling argument was made in *Getto I* in connection with the defendants' position that a court of

equity could not exercise jurisdiction over any dispute concerning a request for refunds arising under sections 36(a) and 76 of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111⅔, pars. 36(a), 76).

In *Getto I* the court stated that sections 36(a) and 76 of the Public Utilities Act did not provide an adequate remedy to the plaintiff since the Commission, under these provisions, had no authority to enjoin the continued imposition and collection of the illegal portion of the message tax. The court said that "[u]nder these circumstances *** the circuit court properly exercised jurisdiction in this cause." (77 Ill. 2d 346, 357.) Though acknowledging that the Commission had no power to enjoin imposition of the tax, the defendants contend now that since this court in *Getto I* made it clear how the tax should be computed, the Commission may administer the refunding process.

As stated in *Getto I*, we do not consider that these sections of the Public Utilities Act provide an appropriate and adequate remedial procedure for the plaintiff. Nor are these sections properly applicable at this juncture of the proceeding. Under section 36(a) of the Act, examination of the question of whether rates or charges imposed by a utility are excessive may be had only when the utility files a supplemental schedule with the Commission. Such a schedule declares the new charges as a result of a utility's decision, under section 36(a), to impose an additional charge upon its subscribers to compensate for the tax levied upon the utility by a municipality under the message tax. As of this stage of the proceeding, Bell has filed a new supplemental schedule reflecting our holding in *Getto I* that the manner in which the message tax was computed was erroneous. This schedule has been approved by the Commission. No challenge to this revised schedule has been made by the plaintiff, and as it now reflects the rates and fees which may be legally charged, section 36(a) no longer provides a statutory means to obtain a refund.

The remedy possible under section 76 would not be adequate. Under it, the Commission's authority to determine whether excessive rates or charges have been imposed arises from the filing of a complaint. The complaint in this proceeding, as determined in *Getto I*, was properly filed with the circuit court and not with the Commission. Also, this section is a limiting one, providing that "[a]ll complaints for the recovery of damages shall be filed with the Commission within one year from the time the produce, commodity or service as to which the complaint is made was furnished or performed * * *." Ill. Rev. Stat. 1977, ch. 111 2/3, par. 76.

Bell also argues that the circuit court erred in ordering Bell to turn over to the trustee all overcharges collected by it since July 18, 1967, which have not already been deposited by the city of Chicago in the special protest fund created by order of the circuit court. Bell argues that, since it has already remitted those tax monies to the city, this court should order that the city and not Bell is responsible for all excess payments, including those made beginning in July 1967. That obviously would be improper. No determination whatever has been made as to liability for overcharges. Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee, excepting those excess charges already deposited with the trustee by the city pursuant to the court's order. This order did not represent any determination of liability by the circuit court.

For the reasons given, the orders of the circuit court of Cook County considered herein are affirmed.

Orders affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE UNDERWOOD, dissenting:

Although the court acknowledged in *Getto I* the "complementary and interlocking nature" (*Getto v. City of Chicago* (1979), 77 Ill. 2d 346, 355) of the municipal message tax and the plaintiff's offsetting payments to Bell pursuant to section 36(a) of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a)), the majority is here led to what seems to me the incongruous result of requiring Bell to pay over to the trustee money which was paid to it without objection between July 18, 1967, and July 18, 1977, despite the fact that this money was remitted to the city in the form of message tax at the time it was originally collected. This result is accomplished by ignoring *Adams v. Jewel Companies* (1976), 63 Ill. 2d 336, *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52, and the cases there cited. Those cases indicate that, in the case of similarly related use tax and retailers' occupation tax, one who voluntarily pays excessive tax to a retailer who, in turn, remits the corresponding tax to the taxing body, cannot, in the absence of statute, later recover the excessive tax.

While paying lip service, the majority today effectively abandons the voluntary-payment doctrine stated in *Illinois Glass Co.* v. *Chicago Telephone Co.* (1908), 234 Ill. 535, 541:

> "It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion."

(*Ross* v. *City of Geneva* (1978), 71 Ill. 2d 27; *Adams* v. *Jewel Companies* (1976), 63 Ill. 2d 336; *Hagerty* v. *General Motors Corp.* (1974), 59 Ill. 2d 52; *Illinois Glass Co.* v. *Chicago Telephone Co.* (1908), 234 Ill. 535.) First, failure to protest payments voluntarily made during the 10-year period is excused on the ground of lack of knowledge that the amounts had been erroneously computed even though no inquiry had been

made and the contents of public records would have disclosed the method of computing the overcharge. Even *Ross* v. *City of Geneva* (1978), 71 Ill. 2d 27, on which the majority relies, is distinguishable, since there the surcharge complained of was protested as soon as it was shown on the bill as a miscellaneous charge. In the present case payments were made without protest during the 10-year period, despite the fact that the charge was shown on customer bills under the heading "City," with a footnote explaining that it was an additional charge due to city taxes. Second, and more importantly, the majority relies on the possibility that the plaintiff labored under an unrealistic fear of termination of service as sufficient to show that the payments were made under compulsion. The fact is, however, that such termination would have been directly contradictory to the orders of the Illinois Commerce Commission prohibiting termination where liability is disputed. Again, *Ross* is distinguishable, for there the defendant had an established policy of terminating the service of those who refused to pay the challenged surcharge. Fears which the majority imputes to the plaintiff are made no more reasonable by the fact that the commission staff was involved in devising the incorrect method of computing the charge, especially since there is no evidence that plaintiff was ever aware of that involvement. (*Getto* v. *City of Chicago* (1979), 77 Ill. 2d 346, 360-63) (Underwood, J., dissenting).) If unreasonable beliefs can provide sufficient compulsion to excuse otherwise voluntary payments, the voluntary-payment doctrine no longer exists.

The doctrine of *laches* (*Pyle v. Ferrell* (1958), 12 Ill. 2d 547) would provide a second reason to deny the plaintiff relief concerning amounts collected during the period from July 18, 1967, to July 18, 1977. The ordinance imposing the message tax was enacted in 1955, as were provisions corresponding to section 36(a) of the Public Utilities Act. Although any recovery will apparently be limited to the 10-year period preceding filing of the complaint in this case, the erroneous computations of taxes and collection fees had been performed

each month for 22 years before plaintiff filed this class action, and the collected taxes were presumably paid to the city by Bell during each of those years. If retroactive recovery is permitted there will be obvious and substantial financial prejudice to the city and the utility, which long ago expended the funds resulting from the now challenged computations.

Having ignored the doctrine of *laches,* and having decided that the voluntary-payment doctrine did not preclude recovery of sums paid prior to July 18, 1977, the majority approves the circuit court's order that Bell deposit with the trustee amounts collected during that period, less whatever amounts had been deposited by the city. Similar action by the appellate court in *Hagerty* was condemned by this court:

"We do not approve the appellate court's statement that:

> 'If defendant collected excess taxes from its customers, it has received and has retained the excess money to which it is not entitled. The fact that defendant may have paid a similar amount of money to the State is of no importance when considering the rights and obligations between defendant and its customers. Any money defendant may have paid to the State was in discharge of its own obligations and does not affect the rights of plaintiff and the class. When defendant retained the tax collected from plaintiff, it was unjustly enriched to the extent to which the tax collected exceeded the amount of tax that it could rightfully collect.' 14 Ill. App. 3d at 43. This reasoning misapprehends the interrelation between the use tax and the retailers' occupation tax. (See *Turner* v. *Wright* (1957), 11 Ill. 2d 161.) If GM erroneously paid a retailers' occupation tax to the State on the same transaction in which it erroneously collected a use tax from the plaintiff, it was not enriched at all, justly or unjustly. If there was unjust enrichment, it was the State that was enriched." *Hagerty* v. *General Motors Corp.* (1974), 59 Ill. 2d 52, 60.

To date, as the majority acknowledges, "No determination whatever has been made as to liability for overcharges." (86 Ill. 2d at 55.) Bell has admittedly paid to the city all of the collected taxes, retaining only the collection charge provided by section 36 to compensate it for its services in collecting the tax. Under the majority's approach to this case, Bell can rationally be required to pay to the trustee of the fund that portion of its collection charge which had been improperly computed. There is, however, in my judgment, no defensible basis upon which Bell may also be required to pay the trustee the improperly computed amounts of tax which it had already paid to the city during the intervening 10 years. If those funds are to be paid into the fund at all, payment should be required from the city to which it was paid. The ordinance required Bell to pay the collected taxes to the city. It did so for 22 years. Now, it is for the first time claimed that the tax was incorrectly computed, and that both the amount of the city's tax and the amount of Bell's collection fee are higher than authorized. Requiring Bell to pay into the protest fund the disputed portion of its retained fees is one thing, but compelling it, instead of the city to which the taxes have been paid, to pay into the fund the amounts of tax previously remitted to the city during the 10-year interval, is, it seems to me, totally unjustified. That action may well pose substantial due process problems in addition to being directly contrary to *Adams, Hagerty,* and the cases there cited.

Whether the utility's future customers or the city's taxpayers, or both, bear the burden of the 10-year refund which appears to be contemplated by the trial court and a majority of my colleagues depends, of course, on whether the majority will permit Bell to eventually recover its duplicate payment from the city, a question the majority refuses to decide now. This anomalous situation typifies the problems resulting when retroactive recovery is permitted of taxes paid without protest for an entire decade.

I would limit recovery here to post-complaint-filing payments of the overcharges.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Constitutional Provisions

U.S. Const. Amend. XIV, § 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Statutory Provisions

Ill.Rev.Stat., ch.24, ¶ 8-11-2

"8-11-2. *Taxation of occupations or privileges*

§ 8-11-2. The corporate authorities of any municipality may tax any or all of the following occupations or privileges:

1. Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.

2. Persons engaged in the business of distributing, supplying, furnishing, or selling gas for use or consumption within the corporate limits of a municipality of 500,000 or fewer population, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

2a. Persons engaged in the business of distributing, supplying, furnishing or selling gas for use or consumption within the corporate limits of a municipality of over 500,000 population, and not for resale, at a rate not to exceed 8% of the gross receipts therefrom. If imposed, such tax shall be paid in monthly payments.

3. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

* * *

Ill. Rev. Stat., ch. 111⅔, ¶ 36(a)

"36. *Change of rates—Notice—Suspension of rates— Temporary schedule—Charge for taxes*

* * *

(a) Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this

Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission."

Chicago Municipal Code, § 132-17.

"132-17. A tax is imposed upon all persons engaged in the business of distributing, supplying, furnishing or selling electricity for use or consumption within the corporate limits of the city, and not for resale, at the rate of four per cent of the gross receipts from such business after December 31, 1973, subject, however, to all the provisions, conditions and limitations in Section 8-11-2 of the Illinois Municipal Code 1961, authorizing this tax, and to all the provisions, conditions and limitations in this ordinance, consistent with the powers conferred upon the city by said section and other relevant law."

APPENDIX I

Rule 21.1 (h) Materials

A. Excerpts from Edison's Memorandum In Opposition To Motion For "Turn-over",pp.5-6

"As shown above, plaintiff's request for a turn-over order against Edison cannot be properly granted because, in substance, it is either a request for a mandatory preliminary injunction or a request for a pre-judgment attachment of Edison's property. Alternatively, if one views the plaintiff's request as a motion for judgment on the pleadings or for summary judgment, it should still be denied. Although plaintiff professes not to be seeking an ultimate determination of Edison's liability, in truth he is requesting that this Court enter a final money judgment against Edison ordering it to pay to the trustee all disputed amounts for a ten year retroactive period. The entry of such an order at this stage of this litigation (i.e., prior to providing Edison an opportunity to be heard on the merits) would surely be a denial of Edison's constitutional right to due process. There are a number of factual issues on which Edison is entitled to present testimony and other evidence. For example, although the Illinois Supreme Court has held that the instant plaintiff lacked sufficient knowledge of the nature and amount of the disputed charge so that his claims *against Illinois Bell* were not barred by the voluntary payment doctrine or the doctrines of waiver and estoppel, it cannot be presumed that all of *Edison's* customers also lacked such knowledge. Moreover, although the claims of the plaintiff as an individual may not be barred, that cannot simply be presumed with respect to all Chicago customers of Edison (particularly its large industrial customers) in the past ten-year period. Edison is entitled to a hearing on these and all other factual issues which it has heretofore raised in its pleadings.

B. Exerpts From Edison's Appellant Brief In The Appellate Court Of Illinois, First Judicial District, pp 24—27

EVEN IF THE TRIAL COURT'S TURN-OVER ORDER COMPLIED WITH APPLICABLE STATUTES AND JUDICIAL PRECEDENT, THE ORDER WOULD DEPRIVE EDISON OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A pre-judgment seizure of property, such as is contemplated in the turn-over Order, which is granted without any showing of grounds for seizures violates Due Process Clauses of the Illinois and United States Constitutions. That the order only temporarily deprives Edison of its property does not put the seizure beyond the requirements of due process. The United States Supreme Court's decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), establishes beyond question the applicability of due process requirements to temporary deprivations. "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." 419 U.S. at 606.

Decisions of the United States Supreme Court establish that, at a minimum, persons whose property is to be seized, even temporarily, must have the opportunity for an evidentiary hearing at a meaningful time. See, e.g., *North Georgia Finishing Inc. supra.* While the availability of an early post-seizure hearing may satisfy the requirements of due process where there is a compelling need for an immediate seizure, *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), there is no suggestion of any such compelling need here. Thus, in this case Edison was entitled to a hearing before entry of the turn-over Order.

At the hearing, the proponent of the seizure must carry the burden of demonstrating facts which establish grounds for the seizure. In *North Georgia Finishing, Inc.*, for example, the

Court held that a Georgia pre-judgment garnishment statute violated due process requirements because it had "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." 419 U.S. at 607. The same Court also observed that the Louisiana sequestration statute which had been approved in its earlier decision in *Mitchell* v. *Grant Co.* "expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued." These requirements were said to be among the "saving characteristics of the Louisian statute." *Id.* More recently, in *Quern* v. *Hernandez* 440 U.S. 951 (1979), the United States Supreme Court affirmed a decision of a three-judge district court concluding that an earlier version of the Illinois Attachment Act was unconstitutional, in part because the statute did not require "an *immediate* post-seizure hearing upon application of the debtor, a hearing in which the attachment creditor bears the burden of proving his entitlement to relief at the risk of dissolution of the writ." *Hernandez* v. *Danaher,* 405 F. Supp. 757, 762 (N.D. Ill. 1975) (emphasis in original).

While the Supreme Court decisions defining the procedural requisites for pre-judgment seizures have all involved statutory remedies such as attachment and garnishment, the Due Process Clause does not distinguish between law and equity and the same requirements undoubtedly apply to all temporary deprivations of property. Thus, however the turn-over Order is characterized, Edison was entitled to a hearing at which the plaintiff bore the burden of demonstrating facts which would justify the relief requested.

In the proceedings below, Edison repeatedly requested such a hearing. Edison's requests were denied. Thus, even if the turn-over Order complied with applicable statutes and standards governing the issuance of preliminary equitable relief, under the facts of this case, its enforcement would deny Edison due process of law.